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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. A-534

HELEN STEIN GAUDET, Administratrix of the
ESTATE OF AWTREY C. GAUDET, SR.,
Respondent,
versus

SEA-LAND SERVICES, INC.,
Petitioner.

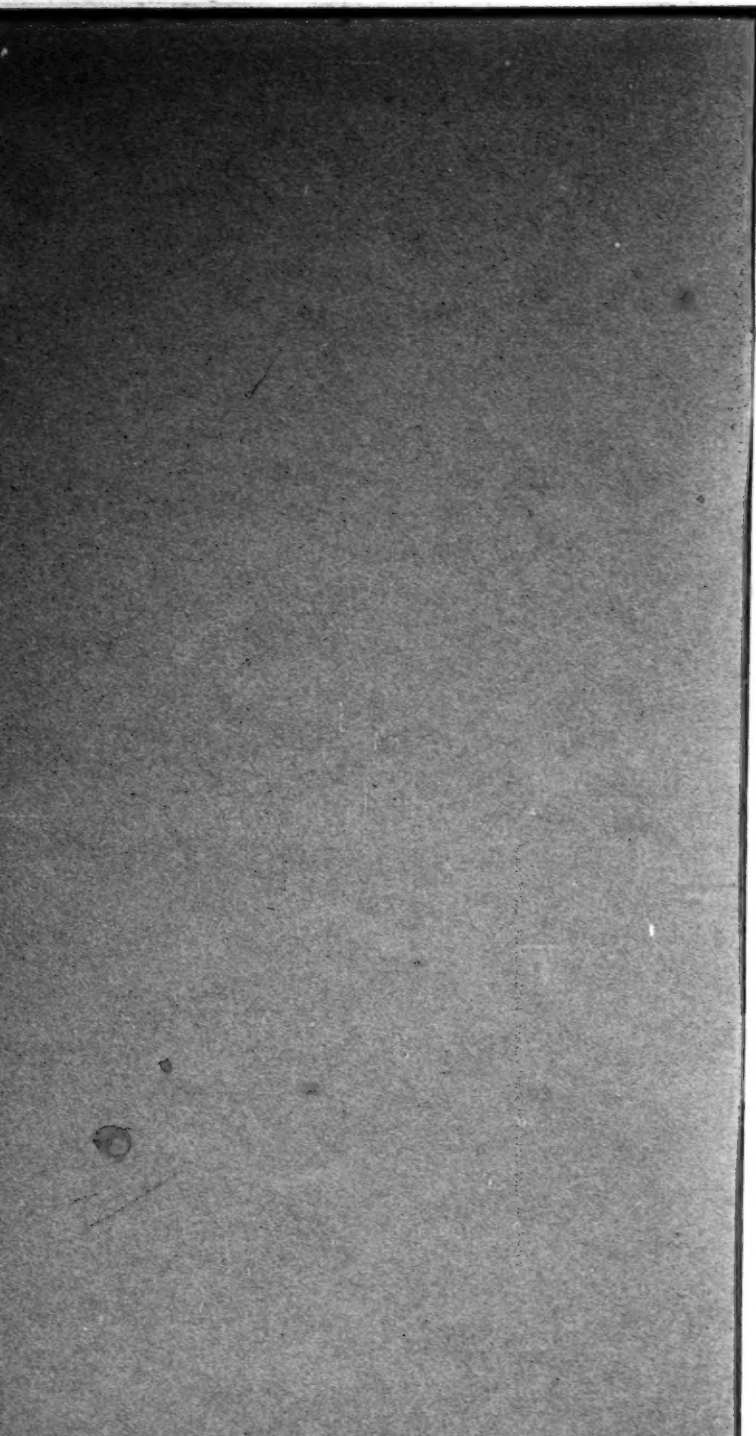
On Application for Certiorari to the Fifth Circuit
Court of Appeals

BRIEF ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

Respondent accepts, by reference, the "Questions presented" as stated by petitioner, except as hereinafter clarified.

Thus, we clarify and restate the sixth question, to read as follows:

(a). In the light of *Moragne vs. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, does an award to decedent made pursuant to a judgment in his favor

prior to his death "anticipate all losses resulting from the accident"? and

(b) Do the survivors still have a claim for their own losses?

STATEMENT OF THE CASE

Except as hereinafter noted, respondent accepts by reference the "STATEMENT OF THE CASE" of petitioner.

The clarification first to be noted relates to the third paragraph on page 4 of the petition for certiorari, wherein it is stated:

"Ten days after the jury award, Mr. Gaudet, Sr. died and thereafter his widow, Helen Stein Gaudet, was substituted in this first case to defend post-trial motion and to answer the appeal.

In the appeal of the original suit Mrs. Gaudet *did not amend her answer to the defendant's appeal or request additional payment for and in effect acknowledged that she had recovered for the financial loss incurred.* On June 24, 1970 Mrs. Gaudet was paid the sum of \$131,000.00 which represents payment for severe financial loss by any reasonable standard." (Emphasis added)

Obviously, in answering the appeal after the death of her husband, the widow was not called upon to present issues other than those already presented in the record as it stood at the time of her husband's death. As of that moment she had a perfect right to defend the judgment as it stood without being subjected to the obvious delay of having a judicial determination of the amount of her loss.

Next, on page 6 of the petition, second paragraph, it is stated:

"The United States Court of Appeals for the Fifth Circuit, on August 3, 1972, reversed and remanded the case to the District Court and indicated that the deceased's recovery for his personal injuries and financial loss prior to his death did not bar Mrs. Gaudet's wrongful death action to recover from her financial loss.

The Court of Appeals acknowledged, in footnote 1 of their opinion, the possibility of double recovery but did not go forward to distinguish pecuniary from non-pecuniary losses and the recoverability by Mrs. Gaudet of non-pecuniary losses." (Emphasis Added)

The foregoing is a gross distortion, as will appear in Argument below.

ARGUMENT

Because petitioner's approach might be described as a sophisticated form of semantic ballet dancing, it becomes necessary to "stop the music" and begin at the beginning:

First, let us examine the actual holding of the Fifth Circuit in the instant case. On page 1333 of 463 F.2d, after listing the various elements of damages in death cases, the Court then quoted the Carroll case, and makes the following comment:

"As the Supreme Court said in the Carroll case, supra, 280 U.S. at 494, 50 S.Ct. at 183:

Although originating in the same wrongful act of neglect, the two claims [personal injury and wrongful death] are quite distinct, no part of either being embraced in the other.

... St. Louis, Iron M & S Ry. Co. v. Craft, 237 U.S. 648, 658, 35 S. Ct. 704, 706, 59 L.Ed. 1160 (1915).

We intimate nothing as to the possibility of Mrs. Gaudet proving any of the possible damage elements listed above, nor which of them should be includible in this federal maritime action. See 25 Ark. L. Rev. 510 (1972). We note only that some of these elements have already been specifically recognized as compensable,

Dennis v. Central Gulf Steamship Corporation, 453 F.2d 137 (5th Cir. 1972); In re Sincere Navigation Corp., 329 F.Supp. 652 (E.D. La.1971), and were not part of Mr. Gaudet's recovery. We conclude, then, that Mrs. Gaudet's suit is not res judicata and such further wrongful deaths compensation as she might receive will not be part of a twice-told tale."

THE COUNTERFEIT CONFLICT

Invoking a classic basis for grant of certiorari, a conflict between two Circuits, petitioner, like a bird dog with a bad head cold, has come to a "false point" by urging that the instant decision by the Fifth is at odds with the 1969 decision of the Third Circuit in **ROBERTS V. UNION CARBIDE CORP.**, 415 F.2d 474.

Respondent submits that **ROBERTS** is an opinion solely concerned with the interpretation of a New Jersey statute. In that opinion, the Third Circuit relied on two New Jersey cases cited. See 415 F.2d 474 at 475.

The instant case is an interpretation (of **MORAGNE V. STATES MARINE LINES, INC.**, 398 U.S. 375 (1970) and could hardly create a conflict with an interpretation of a New Jersey "survival" statute.

Moreover, a reading of the entire two paragraph Per Curiam in **Roberts**, supra, will demonstrate why it is not in conflict with the Fifth Circuit holding here. Thus;

"PER CURIAM:

This is an appeal by the plaintiff in a wrongful death action brought under New Jersey Statutes, 2A:31-1, N.J.S.A. It is the responsibility of the federal courts solely because of the diversity of citizenship of the parties. The essential facts are that the plaintiff's decedent inhaled dangerous fumes while in the employ of All American Engineering Company. During his lifetime the decedent obtained a judgment of \$210,000 against Union Carbide as damages for this mishap, and this judgment was satisfied after an unsuccessful appeal. *Some five years later the decedent died, allegedly as a result of the defendant's above mentioned negligence.* Plaintiff brought suit and summary judgment was entered for the defendant.

While New Jersey's highest court has not ruled on the question raised here, at least two New Jersey cases support the proposition that plaintiff's cause of action is barred and extinguished by the decedent's having obtained a recovery during his lifetime. *Lawlor v. Cloverleaf Memorial Park, Inc.*, Law Div. 1968, 101 N.J. Super. 134, 243 A.2d; *Libera v. Whittaker, Clark and Daniels, Inc.*, Law Div. 1952, 20 N.J. Super. 292, 89 A.2d 734. Compare *Lawlor v. Cloverleaf Memorial Park, Inc.*, App. Div. 1969, 106 N.J. Super. 372, 256 A.2d. We observe that this view is consistent with that of nearly

all states having similar statutes. See Annotation, 39 A.L.R. 579 (1925). Moreover, the record does not sustain the contention that the present action involves elements of recoverable damage not covered by the decedent's earlier suit. (Emphasis added)

Conflicts there are (with previous jurisprudence) but these conflict cases are rather ancient. Thus, the Mellon case, page 10 of petitioners application for certiorari, is a rather old melon (1928) and the treatment at page 11 of the petition is self defeating, once we concede the distinction between causes of action which have not accrued, viz, death.

The 1931 decision in FLYNN V. NEW YORK N.H.&H.R. CO., 283 U.S. 53, involved an issue of prescription or limitations and the other cases cited (page 12, 13, petition) are even further out of focus.

RES JUDICATA

On page 14 of its petition for certiorari it is stated:

"Two conditions must be met in order for the exception of Res Judicata to apply:

1. "The judgment or decree of a Court of competent jurisdiction on the merits precludes the parties and their privies to the litigation and constitutes a bar to a new action or suit involv-

ing the same cause of action either before the same or any other tribunal, and

"2. Any right, fact or matter in issue, and directly adjudicated on or necessarily involved in the determination of an action before a competent Court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and their privies whether or not the claim or demand, purpose or subject matter of the two suits is the same. Vol. 50 Corpus Juris Secundum, Sec. 592, P. 11. (Emphasis supplied).

"We submit that the second suit by the widow meets all of the essential elements necessary to invoke the doctrine of Res Judicata.

"The widow of the deceased cannot recover again for loss of future earnings which the deceased would have earned had he lived, as his recovery in the first case included the loss of earnings, past and future. Allowance of such recovery would compensate the widow twice for the identical elements of damage. The allegations of the pleadings are identical and again the widow is requesting payment for "severe financial loss". The widow is seeking the proverbial pound of flesh, which the Court has no power to grant."

A modern statement of the applicable rule of res judicata under the instant facts (and without the Shylockean flourish) is to be found in 46 American Jurisprudence 2d, Sec. 418, page 586, wherein it is stated:

"The rule granting conclusiveness to a judgment in regard to issues of fact which could properly have been determined in the action is limited to cases involving the same cause of action. Where a second action is upon a different claim, demand, or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the issues, points, or questions actually litigated and determined, and not as to matters not litigated in the former action, even though such matters might properly have been determined therein." (Emphasis added)

Obviously, the judgment of the District Court, could not be deemed conclusive as to the effects of the death of decedent in the fullest sense. First of all, his anticipated loss of earnings could only be estimated properly upon his life expectancy, based upon mortality tables.

In its opinion in the instant case the Fifth Circuit recognizes that there may be an "overlap" *quo ad* "loss of earnings" and the direct effect, financially, upon the widow. The Court left this problem of adjustment on remand to the trial Court, just as it left to the trial Court of all other elements of damage.

But it strikes us, as a matter of common sense that the translation into dollars and cents of the actual loss to a widow of her husband, is a radically different process than the estimated loss of earnings of a husband before he ever dies or knows he is dying.

This is quite separate and apart, of course, from the elements of emotional damage, such as loss of affection, loss of consortium, etc., *all of which is reserved by the Fifth Circuit* in the instant case.

CONCLUSION

For the foregoing reason we respectfully submit that the writ should be denied and the decision of the Fifth Circuit affirmed.

Respectfully submitted

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ATTORNEYS FOR
RESPONDENT

CERTIFICATE OF SERVICE

I, George M. Leppert, hereby certify that I am a member in good standing of the Bar of the Supreme Court of the United States, that all of the foregoing facts are true and correct and that a copy of the foregoing brief has been served upon opposing counsel, correctly addressed and postage prepaid on the 27th day of July, 1973.
